IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 40 OF 1997.

1. Dr. Samiro Mascarenhas,
   Medical Practitioner,
   residing at Mascarenhas
   Building, Vasco-da-Gama,
   Goa.

2. Mrs. Zeena Mascarenhas,
   wife of Samiro Mascarenhas,
   housewife, residing at
   Mascarenhas Building,
   Vasco-da-Gama, Goa. ... Appellants/
   Orig.Plaintiffs.

VERSUS

1. Mr. Valente D'Costa,
   residing at Mascarenhas
   Building, Vasco-da-Gama,
   Goa.

2. Mrs. Christine D'Costa,
   wife of Valente D'Costa,
   housewife, residing at
   Mascarenhas Building,
   Vasco-da-Gama, Goa.

3. Mrs. Maria D'Costa,
   residing at Mascarenhas
   Building, Vasco-da-Gama,
   Goa. ... Respondents/
   Orig. Defendnts.

Mr. J.E. Coelho Pereira, Senior Advocate with
Mr. S. Karpe, Advocate for the Appellants.

Mr. B.B. Lakhakar, Advocate for the Respondents
Nos.1 and 2.

CORAM: N.A. BRITTO, J.

DATE: 11TH JUNE, 2004.

ORAL JUDGMENT:

The appellants herein were the plaintiffs in RCS No. 23/85 and their suit came to be dismissed, on

the ground that the Court had no jurisdiction, by Order dated 11th July, 1990 of the learned Civil Judge, Senior Division, Vasco-da-Gama. The plaintiffs preferred an appeal to the District Court and the learned Addl. District Judge, by his Judgment and Order dated 30.6.97 dismissed the appeal. The plaintiffs have now approached this Court in Second Appeal against the said judgment and order of the learned Addl. District Judge, dated 30.6.97.

2. At the time of admission, the appeal was admitted on substantial questions of law as framed by the plaintiffs,namely in para 13-A), B), D), E) and H). But at the time of arguments, Shri Coelho Pereira, learned senior counsel of the plaintiffs, has fairly conceded that the questions at 13-B, D, E and H are matters which have got to be decided by the trial Court and cannot be decided by this Court in the present appeal.

The said substantial question 13-A reads as follows :-

" A) As to whether considering the issues as framed, the suit could be disposed of on issue no. 6 as a preliminary issue without recording any evidence considering the fact, that the decision on issue no. 6

depended on ascertainment of facts namely, as to whether the Respondents as a fact were heirs of the deceased Pulqueria D'Costa and as to whether the Respondents were falling within the definition of tenant within the meaning of Section 2(p) of the Goa, Daman & Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 as to (or?) whether they were trespassers in respect of the suit floor. "

3. Some more facts are required to be stated to dispose of the said substantial question of law raised in the second appeal.

4. The dispute is regarding the tenancy in respect of the premises consisting of first floor of a building known as "Mascarenhas Building" which belonged to the family of the plaintiffs. The said premises were let out to Smt. Pulqueria Henriques D'Costa by agreement of lease dated 9.10.1956 by the mother of the plaintiffs, for a period of one year which was continued by another agreement dated 13.10.1969 executed by the father of the plaintiffs, on payment of monthly rent of Rs.720/-. The said lease was renewed subsequently by another agreement dated 12.11.1970. The case of the plaintiffs is that the plaintiff no.1 became the owner of the said premises by virtue of deed of sale and gift dated 30.3.1974 and thus the

plaintiffs have become the absolute owners of the said premises for all purposes.

The said premises were being used by the said Smt. Pulqueria Henriques e Costa for the purpose of Hospedaria – Guest house,under the name of "Hospedaria Costa". The said Smt.Pulqueria, widow of Francisco D'Costa died on 18.8.83. According to the plaintiffs the said Francisco and Pulqueria had no issue of their marriage and both died without leaving any ascendants or descendants or any other legal heirs and that the defendants are now falsely claiming to be the legal heirs and successors of the said Francisco and Pulqueria D'Costa. The case of the plaintiffs was that upon the death of the said Smt. Pulqueria the defendants have been unauthorizedly and illegally occupying the said premises and that they are rank trespassers. In fact, the plaintiffs stated that the defendant No.1 was an illegitimate child of Crisnem Naiquina from Chapora and his paternity was not known and that defendant no.3 who was an orphan when born, was brought by the brother-in-law of Smt. Pulqueria when she was about 10 to 15 years of age and then the said defendant No.3 had started working as a maid servant of the said Pulqueria. The plaintiffs therefore filed the said suit,inter alia,praying for a judgment and decree declaring the defendants as

trespassers of the said premises and for a declaration to the effect that the defendants had no right or claim to use or occupy any portion of the said premises on any ground and for any purpose. The plaintiffs also 0 sought their eviction as well as for mesne profits.

5. The defendants resisted the suit stating that the suit was not maintainable in view of Section 56 of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (Act, for short). The defendants pleaded that they were tenants of the said premises in view of the definition of "tenant" as given in section 2(p) of the Act. The defendants further pleaded that as per instructions of the landlord Shri Sebastiao Mascarenhas, the father of plaintiff no.1 the rent was being deposited in Account No.2261 in Canara Bank in Vasco-da-Gama who used to draw the same during his lifetime and that the defendants understood that after the death of the said Sebastiao the account was in the name of Fr. Sergio Antonio Jose Mascarenhas, brother of plaintiff no.1, the owner of the suit premises. The defendants have pleaded that they have been regularly and without any default paying the rent into the said account and the plaintiff no.1 had not attorned himself as the landlord of the suit premises during the last 11 years as it was his own contention that he became owner of the suit premises by virtue of

the said sale/gift deed dated 30.3.74 and therefore he could not now be heard to say to the contrary respecting the tenancy rights of the defendants. The defendants further stated that they were in possession of the suit premises and by virtue of the said definition of section 2(p) of the Act they were undoubtedly the tenants. The defendants also pleaded that they were the legal heirs of the said Mrs. Pulqueria being the son and daughter and the defendant no.2 being the daughter-in-law. The defendants also pleaded that the paternity of defendant no.1 was disclosed on the marriage certificate issued by the parish priest of St. Andrew's Church, at the time of the marriage of defendant No.2 with defendant no.1. The defendants further pleaded that the defendants No.1 and 3 were brought up by the said Francisco and Pulqueria as son and daughter and were acknowledged as such by the whole world and at all times and in all places the defendants No.1 and 3 were mentioned as the son and daughter of the said D'Costas. The defendants further pleaded the said D'Costas even by their public Will dated 5.2.77 bequeathed their entire property to defendants No.1 and 3.

6. The learned Civil Judge, Senior Division, on 20.9.88 framed as many as six issues including the issue " Whether the plaintiff proves that the defendant

No.1 was the illegitimate son of Krishnem Naiquina and whether the plaintiff proves that Smt. Pulqueria Henriques D'Costa, died without leaving any ascendant or descendant ".

7. The learned Civil Judge also framed an issue; "Whether the defendants No.1 and 3 prove that they are the legitimate son and daughter of late Smt. Pulqueria Henriques D'Costa and that they had inherited the tenancy right after the death of their mother ".

Issue No.6 which was framed by the learned Civil Judge reads as follows :-

" Whether the defendants prove that this Court has no jurisdiction to try and entertain the suit as the defendants are independently occupying the suit floor as tenants and that their relation is that of landlord and tenant " and further ordered that Issue No.6 be tried as preliminary issue and after referring to certain observations made by the learned District Judge at the time of deciding the application for temporary injunction, came to the conclusion that the court had no jurisdiction to entertain the suit.

8. At this very stage, I may hasten to say that even before the learned Civil Judge considered the plea

of tenancy raised by the defendants, he came to the conclusion that he had no jurisdiction to entertain the suit !

9. The learned Addl. District Judge in para 10 of the Judgment came to the conclusion that Civil Court had no jurisdiction because the defendants were in possession and running the business at the time of death of Pulqueria and also because by letter dated 18.6.84 written by plaintiff no.1 to Defendants No.1 and 2 it was admitted by Plaintiff No.1 that defendants were continuing to run the said Hospedaria without his written consent. The learned Addl. District Judge also concluded that the learned Civil Judge had rightly decided, based on the judgment of the District Judge dated 30.4.86 that Civil Court was debarred from exercising jurisdiction under Section 56 of the Act.

10. Shri Coelho Pereira, the learned senior counsel of the plaintiffs, submits that the decree of the trial court has now merged in the decree of the appellate court and further submits that the suit of the plaintiffs could not have been dismissed on a preliminary issue without evidence being led by the plaintiffs. Shri Coelho Pereira has further submitted that it was for the Civil Court to decide, only after evidence was led by the parties, whether the defendants

were the protected tenants under the Act.

11. On the other hand, Shri Lakhakar, the learned advocate of the defendants has submitted that contractual tenancy had devolved upon the defendants no.1 and 3 who were the son and daughter of the said Smt.Pulqueria who had always recognized them as such. The other submissions made by Shri Lakhakar, the learned counsel of the defendants, are in tune with all the pleas taken on behalf of the defendants in their written statement and the documents which were annexed to it to support their claim of tenancy. Shri Lakhakar has placed reliance on the case of **Smt. Hirabai Gurudas Talaulikar and others v. Shri Joao Manuel Santa Rita Piedade Camara and others** (2000(1) Goa L.T. 378) to support his submission that the tenancy devolves upon the legal representatives of the deceased tenant. In fact, what was upheld in the case of Smt. Hirabai was the proposition that whether the tenancy rights in the premises used for commercial purpose devolve upon the heirs of the tenant or not could not be decided as a preliminary issue and the said issue was required to be tried on merits along with the other issues after leading evidence.

12. Shri Lakhakar has also placed reliance on the case of **Vasant Pratasp Pandit v. Dr. Anant Trimbak**

Sabnis (1994 Mah.L.J., 1450) in support of his submission that when a tenant dies, protection could be extended to the members of the family who were participants in the benefit of the tenancy and for whose needs as well the tenancy was originally taken by the tenant and that when such members of the family are not there, the 'heirs' will be entitled to be treated as tenants as decided, in default of agreement, by the court.

13. Shri Lakhakar also placed reliance on the case of **Kamal Chintaman Mithari and others v. Ganpatrao Ramchandra Powar** (1978 Mh.L.J. 116) to show that even a mistress who was in exclusive keeping of a statutory tenant living with him till his death, would be considered to be a member of the tenant's family.

14. Two provisions of law are required to be noted to dispose of the substantial questions of law on which the present appeal has been admitted. The first is section 2(p) which defines the expression:" "Tenant" to mean any person by whom or on whose account or behalf the rent of any building is, but for the special contract would be payable and includes in the event of his death the surviving spouse, or any son, or unmarried daughter or father or mother, who had been living with him as a member of his family upto the date

of his death and a sub-tenant and also any person continuing in possession after the termination of his tenancy, but shall not include any person against whom any order or decree for eviction has been made. " As regards this definition, Shri Lakhakar has placed emphasis on the words "any son" appearing in sub-section (p) of Section 2 of the Act that the legislature did take note that any son including an adopted son could have inherited the tenancy.

15. The other provision is Rule 2 of Order 14 C.P.C. Rule 2 requires a court to pronounce judgment on all issues and sub-rule (1) provides that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub-rule (2) further provides that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to -

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit,

postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

16. A reference to section 56 of the Act will also not be out of context. "Section 56 bars the jurisdiction of the civil court and provides that save as provided in this Act, no court shall have jurisdiction to settle, determine or deal with any question which is by or under this Act required to be settled, determined or dealt with by the Controller, the Rent Tribunal, the Appellate Board, the Administrative Tribunal, or the Administrator, and no order passed by any such authorities under the Act shall be called in question in any court."

17. The question of entertaining the bar created by section 56 of the Act would come into play only when the defendants had succeeded in proving the plea of statutory tenancy put forward by them. The case at hand was a case where the plaintiffs had averred that the defendants were trespassers, they being not the descendants or legal heirs of the said Francisco and his wife Pulqueria. On the other hand, the defendants No.1 and 3 had pleaded that they were the son and daughter of the said Francisco and Pulqueria and in any event they were admitted or acknowledged to be so by

the whole world. A plea whether a person is a tenant or not is always a mixed question of fact and law. Such a plea could not be decided unless the parties were given an opportunity to lead their evidence and prove the facts alleged by them in support of the said plea. In my opinion, such plea also could not be decided, unless evidence was led in the trial of the suit, on certain observations made at the appellate stage by the learned District Judge while disposing of an application for temporary injunction. There was no issue of law only as contemplated by sub-rule (2) of Order 14 C.P.C.which could be decided as a preliminary issue. The Court is given discretion in terms of O.14, Rule 2(2) C.P.C. to try an issue of law only as a preliminary issue only if it relates to (a) jurisdiction of the Court, or (b) a bar to the suit created by any law. Such was not the case at hand because a plea of tenancy involves proving mixed questions of fact and law. In this view of the matter, the learned Civil Judge as well as the learned Addl. District Judge fell in gross error in deciding the suit filed by the plaintiffs on the said preliminary issue which could not be decided as a preliminary issue.

18. The question framed therefore has got to be decided in the negative. In other words, both the judgments/orders of the learned Civil Judge, Senior

Division as well as the learned Addl. District Judge respectively deserve to be set aside. The suit of the plaintiff is remanded back to the learned Civil Judge, Senior Division, Vasco-da-Gama to be tried on merits, on all issues.

19. The parties are hereby directed to remain present before the learned Civil Judge, Senior Division at Vasco-da-Gama on 30th instant at 10.30 a.m. It is hoped that the learned Civil Judge, Senior Division will follow the directions issued by the Hon'ble Supreme Court and take up the case on day to day basis, the suit being of the year 1985.

N.A. BRITTO, J.

sl.